



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## SUPREME COURT OF INDIANA.

LENGELSON ET AL. V. MCGREGOR ET AL.

March 8, 1904.

(70 N. E. 248.)

- BILL OF EXCEPTIONS—*Signing—Time—Absence of judge—Nunc pro tunc order—Diligence.*—1. Where a bill of exceptions was not signed until after the term, nor within the time fixed by the court, it could not be considered on appeal, though appellant's failure to procure the signing thereof within the time resulted from the trial judge's absence from the state.
2. Where, during the time fixed by the trial judge for the preparation and service of a bill of exceptions, he left the state, thereby preventing appellant from procuring a settlement of his bill within the time limited, and appellant was diligent in the preparation of his bill, he was entitled to have the same signed *nunc pro tunc*.
3. After the trial of a case the court granted 60 days within which to prepare bills of exceptions, and on the fifty-ninth day appellant had prepared for signing two bills, one occupying 2 written pages of the record, and another embracing 60 typewritten pages. The judge being absent from the state at such time, appellant was unable to procure his signature to the bills within the time fixed, though there were 36 days after the end of the trial in which to prepare the bills before the judge left home. *Held*, that a finding that appellant had not exercised due diligence in presenting his bill, and was, therefore, not entitled to an order signing the same *nunc pro tunc* after the judge's return after the expiration of the time limited, was proper.

On rehearing. Petition overruled.

For former opinion, see 67 N. E. 524.

HADLEY, J.:

Appellant, in support of his petition for a rehearing, very earnestly contends that we erred in holding that his bill of exceptions containing the evidence was not properly in the record. He relies upon the maxim, "*Actus curiæ neminem gravabit*," to protect him against the loss of his bill of exceptions by reason of the absence of the trial judge from the state, when he, within the time allowed, did all he could to present the bill for settlement. The pith of his argument is that a court will not be permitted to throw a litigant off his guard by granting him a time beyond the term to prepare a bill of exceptions, and then defeat the privilege by absenting himself from the state until the time has expired. We have no disposition to deny the justness and reasonableness of

the maxim invoked, to-wit, "An act of the court shall prejudice no one," and will unhesitatingly give the principle force and effect in a case where it applies and we have authority to do so. It is doubtless the law that a litigant who has been awarded time for a bill of exceptions, and who has successfully completed his bill within the time, and who has been diligent in its preparation and presentation, should be afforded an opportunity to present it, and should not be deprived of the bill by the absence of the trial judge from the state. *State v. Dyer*, 99 Ind. 426; *Fechheimer v. Trownstiene*, 12 Colo. 282, 20 Pac. 704; *Stonesifer v. Kilburn*, 94 Cal. 33, 29 Pac. 332. But what we decided in the original opinion, and what we reaffirm here, is that the signing of exceptions under and at a date subsequent to the time allowed for the signing and filing of the same imparts no validity to the instrument as a bill of exceptions. The statute, though remedial in character, is mandatory, and prescribes the precise terms upon which exceptions may, after the term, be authenticated and incorporated into the record. And it is plain that we have no authority to treat any document or instrument of writing as a bill of exceptions unless upon its own face it shows affirmatively that the terms of the statute have been complied with, and, among other things, that it was presented to, or was settled and signed by, the trial judge within the time granted by the court. The doctrine rests upon the principle that, the statute being the only authority for a bill of exceptions after adjournment of the court, it can only be had upon the terms of the statute, and a bill signed by the presiding judge after the expiration of the time lawfully fixed is without authority or jurisdiction, and amounts to nothing more than if signed by the clerk. *Rigler v. Rigler*, 120 Ind. 431, 22 N. E. 776; *Rubber Co. v. Midland*, 63 Ohio St. 66, 57 N. E. 958; *Neuman v. Becker*, 54 Ohio St. 323, 46 N. E. 706; *Walker v. Mortgage Company*, 100 Ga. 84, 26 S. E. 75; 3 Cyc. p. 38; *Daugherty v. Western Union Tel. Co.* (C. C.) 61 Fed. 138. After expiration of the time allowed, the judge loses jurisdiction over the subject matter, and cannot be reclothed with it by agreement of the parties. *Long v. Newhouse*, 57 Ohio St. 348, 366, 49 N. E. 79; *Morris v. Watson*, 61 Ill. App. 536. A failure of the stenographer to prepare the longhand manuscript of the evidence, though the party excepting has been diligent, is ineffectual as an excuse for signing or filing of a bill after time.

*Horbach v. Omaha*, 49 Neb. 851, 69 N. W. 121. Pressure of official business upon the trial judge furnishes no reason or authority for him to sign a bill after the time has expired. *Walker v. Mortgage Company*, 100 Ga. 84, 26 S. E. 75. To take cognizance of a bill of exceptions that shows upon its face to have been created in disobedience of the statute would be to hold that we have discretionary power to dispense with the law whenever we deem it proper to do so. In such cases, therefore, the only way for an aggrieved party to get his exceptions into the record is to procure the insertion of the proper date of presentation *nunc pro tunc*, and thus send up on appeal a bill fair upon its face. *Rigler v. Rigler*, *supra*; *Kirby v. Bowland*, 69 Ind. 290; *Walton v. U. S.*, 9 Wheat. 651, 6 L. Ed. 182; *Ferris v. Nat. Bank*, 158 Ill. 237, 239, 41 N. E. 1118; *Railroad Co. v. Morrison, Adams & Allen Co.*, 160 Ill. 288, 43 N. E. 393; Ewbank's Man. section 31. And if a party is able to show that he has been diligent in the preparation and presentation of his bill, and in good faith and in due season had his prepared bill at the court, office, residence, or other place within the judicial circuit where the judge might reasonably be expected to be, and was prevented from presenting the same by the absence of the judge from the state or judicial circuit, the act is such a presentation of the bill, if promptly presented to the court upon his return, as will authorize the latter, upon notice and motion, to insert *nunc pro tunc* the date when the presentation was defeated by his absence. *Davis v. Patrick*, 122 U. S. 143, 7 Sup. Ct. 1102, 30 L. Ed. 1090. The right, however, rests upon diligence, and upon the fact that the exceptor has done all he reasonably could do to secure the prompt approval of his exceptions. And whether he has been diligent or not must be determined by the sound judgment of the presiding judge upon the facts of the particular case. Here appellant was allowed sixty days from March 15th in which to prepare and file his bills of exceptions. He had them ready for presentation to the judge on the fifty-ninth day. In *Daugherty v. Western Union etc. Co.* (C. C.) 61 Fed. 138, the answer in an application for removal was due February 13th. On that day the defendant's attorney, residing in an adjoining county, left home for the place where the court was held, by a passenger train which was due to arrive at ten o'clock a. m., and which was only prevented by a very unusual snowstorm, with respect to which, Baker, J., said:

"The failure to start for the place where the court was sitting until the day when the answer was due was such an act of negligence as to defeat the right of removal, without regard to the delay occasioned by the storm."

Bill of exception No. 1, based on a motion to modify the judgment, occupies two written pages of the record, and No. 2, containing the longhand manuscript of the evidence, embraces sixty typewritten pages. Because sixty days were granted did not excuse appellant from promptly and diligently proceeding with the preparation and presentation of his bills with as much dispatch as circumstances would reasonably allow. He could not be held blameless if he negligently postponed their preparation or presentation to the very end of the period. It is not shown that it would require anything like sixty days for appellant's attorney to prepare bill No. 1, or for the stenographer to write out the evidence. There were thirty-six days in which to accomplish the work before the judge left home. The judge was a special judge, resided in another county, and had no official or other known reason to keep him at home or in the circuit. There was no correspondence with the judge to ascertain whether he would remain at home to the end of the sixty days. Appellant might have had timely notice of the judge's intended absence from the state, and might have had ample time and opportunity to prepare and present his bills before the judge went away. These and other matters involving the question of diligence were properly cognizable by the court in determining whether appellant presented a case warranting the signing of his bills now for then. The court, from the known facts and the evidence before it, decided that appellant was not entitled to have his bills signed *nunc pro tunc*, and refused to so sign them. The conclusion thus reached in the *nunc pro tunc* proceeding was a judicial judgment upon the evidence before the court, and is impeachable on appeal only as ordinary judgments of the court.

The record shows that what purports to be bills of exceptions were signed by the judge twenty days after the expiration of the time granted therefor, to-wit, June 4th, and when he had no jurisdiction of the subject-matter, and no power to impart validity to the documents as bills of exceptions. They must, therefore, be regarded as nullities, and as serving no purpose in the record.

The petition for a rehearing is overruled.

EDITORIAL NOTE—*Bills of Exception.* There is in this case so much of interest to the Virginia lawyer that we have determined to report it in full. It concerns a subject upon which accurate knowledge of the law at the right moment is all important. Many a meritorious case has been lost because of a technical failure in the bill of exceptions, and candor requires that we go farther and say that courts often seem to avoid the decision of perplexing points on the merits by placing before the judicial eye lenses strong enough to detect trifling errors in the bills presenting them and pronouncing them in consequence *coram non.*

In a proper consideration of the principal case by the bar of this state, our statutory provisions are of course a necessary element. They are not numerous and are as follows :

Code of Virginia, Section 3385, as amended by Act of February 15, 1901, (Acts Extra Session, 1901, p. 186):

"In the trial of a case at law, in which an appeal, writ of error, or *supersedeas* lies to a higher court, a party may except to any opinion of the court, and tender a bill of exceptions, which (if the truth of the case be fairly stated therein) the judge shall sign ; and it shall be a part of the record of the case. Any bill of exceptions may be tendered to the judge and signed by him, either during the term at which the opinion of the court is announced, to which exception is taken, or in vacation, within thirty days after the end of such term, or at such other time as the parties, by consent entered of record, may agree upon, and any bill of exceptions, so tendered and signed by the judge as aforesaid, either in term or in vacation, shall be a part of the record of the case." <sup>1</sup>

Pollard's Supplement, section 3385a (Acts 1897-8, p. 754):

"Sec. 3385a. To dispense with the necessity for a motion for a new trial in certain cases.—The failure to make a motion for a new trial in any case in which an appeal, writ of error, or *supersedeas* lies to a higher court shall not be deemed a waiver of any objection made during the trial if such objection be properly made a part of the record." <sup>2</sup>

Code of Virginia, Section 4050 :

"Section 4050. When bill of exceptions may be taken.—A party in a criminal case, or proceeding for contempt, for whom a writ of error lies to a higher court, may except to an opinion of the court and tender a bill of exceptions, which (if the truth of the case be fairly stated therein) the judge shall sign ; and it shall be a part of the record of the case."

<sup>1</sup> This statute has been recently considered in *Lynchburg Cotton Mills v. Stanley* (Va.), 46 S. E. 908, and the thirty days held to mean from the adjournment of the term at which the final judgment is rendered—not that at which the decision was made to which objection is taken. An objection has been made to this act that in the larger cities of the state, where one term of court is almost immediately succeeded by another, there are not thirty days of vacation, within which alone the act permits the bill to be signed, and that consequently the relief contemplated by the statute is not afforded. A bill amending the act in this particular alone was introduced at the late session of the General Assembly, but perished, not upon its merits, but for the customary reason with such measures—failure to perceive its importance.

<sup>2</sup> This statute was doubtless enacted in view of rulings to the opposite effect in *Central Land Co. v. Obenchain*, 92 Va. 130, and *Norfolk v. Pollard*, 94 Va. 279.

An examination of recent Virginia decisions will disclose the following rulings in point:

*Office of bill.* To set forth a specific and definite allegation of error and so much of the evidence as is necessary to a clear apprehension of the ruling of the court. If it fail to do this, the exceptions will prove unavailing. *Holleran v. Meisel*, 91 Va. 143.

*Exception must be noted.* The refusal of judge to sign a bill, when the record does not show that losing party excepted at trial, is not error. *Branford v. Karn*, 87 Va. 242.

*Demurrers.* It is unnecessary to except to the action of a trial court in overruling a demurrer to a declaration. *Russell Creek Coal Co. v. Wise*, 96 Va. 416. And also to a ruling upon a demurrer to evidence. *C. & O. Ry. Co v Sparrow*, 98 Va. 630.

*Bill must show object.* The refusal of a trial court to permit a witness to answer a question will not be reviewed unless the bill shows what was proposed or expected to be proved by the witness. So, also, as to examination of juror on *voir dire* *Langley's Case*, 99 Va. 807; *A. & D. Ry. Co. v. Reiger*, 95 Va. 418; *Jackson's Case*, 98 Va. 845; *Kimball, etc., Receiver v. Carter*, 95 Va. 77, holding further that the bill must point out specifically the ruling objected to. But when the bill shows that the character of such answers was disclosed on the argument on the admissibility of the evidence, this will suffice. *Clark v. Sleet*, 99 Va. 381. But the materiality or relevancy of the rejected evidence must still be shown. *Driver v. Hartman*, 96 Va. 518; *Brock v. Bear*, 100 Va. 562; *Consumers Ice Company v. Jennings*, 100 Va. 719. But this is not necessary when witness is excluded on ground of incompetency. *Mut L. I. Co. v. Oliver*, 95 Va. 445.

*Stipulations.* Stipulations between counsel that objections to evidence may be noted during its introduction and that such objections may be taken advantage of in the appellate court as though presented in formal bills will not be regarded on appeal. *Kibler's Case*, 94 Va. 804; *N. & W. Ry. Co. v. Shott*, 92 Va. 34; *Langley's Case, supra*; *Hughes v. Kelly*, 2 Va. Dec. 588.

*Mandamus to sign bill.* The Court of Appeals has power, by *mandamus*, to compel a judge of an inferior court to sign a proper bill of exceptions. If, on application for a *mandamus* to compel a judge to sign a bill of exceptions, he answers that he refused to sign the bill because it did not state the truth of the case, and the relator traverses this answer, an issue of fact is presented, to be determined upon the evidence, whether the bill did correctly set forth the truth of the case. *Collins v. Christian, Judge*, 92 Va. 731. *Collins v. George* (Va.), 46 S. E. 684.

*Reference from one bill to another.* As a general rule, one bill of exceptions cannot be looked to in order to supply an omission in another, unless one refers to the other, but the rule is not of universal application. A written lease which is the basis of the suit, and which is copied into one bill of exceptions, may be looked to in connection with another bill of exception which fully identifies it, where it is manifest that no injustice can be done the parties. *Richmond Ice Co. v. Crystal Ice Co.*, 99 Va. 239. To same effect, *Matthews v. Traders Bank*, 2 Va. Dec. 539, 27 S. E. 609.

*Several exceptions in one bill.* Several exceptions may be saved in the same bill, provided they specifically and definitely set forth the allegation of error and so much evidence as will render clear the ruling of the trial court. But the practice tends to produce confusion and is not to be commended. *Holleran v. Meisel*, *supra*; *N. & W. Ry. Co. v. Ampey*, 93 Va. 108; *Norfolk etc. R. Co. v. Shott*, 92 Va. 34. The evidence is not part of the record unless made so by bill of exceptions. *West v. R. etc. Ry. Co.* (Va.), 46 S. E. 330.

*Rulings on instructions.* One bill of exceptions, duly taken, is sufficient to bring up for review, in the appellate court, all of the instructions given or refused on objections thereto. *Richmond P. & P. Co. v. Robinson*, 100 Va. 394.

*Conclusiveness.* Where a party has accepted a bill as signed it is conclusive of what did occur, and its correctness cannot be questioned. *Collins v. George* (Va.), 46 S. E. 684.

The theory of the principal case is discussed in *Va. Development Co. v. Rich Patch Iron Co.*, 98 Va. 700, which was decided, however, before the passage of the Act of February 15, 1901, *ubi supra*, and was doubtless its *causa causans*. Nevertheless, there is much in the opinion in that case which is in no wise affected by the recent legislation, tending to show the necessity of affirmative action to give a trial court at a subsequent term authority to sign a bill in a case tried at a previous term—as by failure to enter judgment, entering a motion for a new trial and continuing it until the next term, or by leave reserved to sign a bill at the next term and its subsequent signing. The point will doubtless be made that as to these methods, the Act is exclusive, being sufficiently broad in its terms to afford all necessary relief from the danger of losing a point because of an early adjournment or pressure of business, and as this was unquestionably the evil sought to be remedied by the Act, the point may be sustained. The court frankly admits having in *Davis v. Poland*, 92 Va. 225, reversed a judgment upon bills of exception signed in vacation, but makes the plea for permitting the point to escape its attention that “courts must rely upon the intelligent scrutiny by counsel of the records under investigation, to call attention to errors committed, or to any deviation or departure from established methods of procedure”—“this most essential aid to the administration of justice,” “an able and inquisitive bar.” Surely a generous and appreciative bar can in its turn do nothing else than overrule a demurrer to this plea.

Coming now to a consideration of the principal case, it seems to present a condition of facts which has not to our knowledge been passed upon by the courts of this state, and yet such as may arise at any time. Indeed, we wonder that the question has not long ago been presented here, as it has been repeatedly in other jurisdictions. Our trial judges may absent themselves, or from sickness, death or other unavoidable cause be prevented from signing a bill within the prescribed time, but so far as we are advised, we have no statutory provision to meet the emergency and thus prevent what may be a miscarriage of justice. Indeed, we have seriously considered the advisability of having the life of the trial judge insured for the benefit of a party professing to be prejudiced by his ruling, until the time that the bills are signed and the record perfected, though we are not sure that in criminal cases even this would yield the desired results.

The weight of authority is decidedly in favor of the general proposition that a bill made after *the time prescribed*, whatever that may be, will not be considered—the reason manifestly being that the facts should be presented to the judge while they are fresh, and mistakes resulting from imperfect memory be thus avoided. But there have been departures from the rule at the hands of leading courts—in the interest, we presume, of “substantial justice.” Thus in *Hill v. Egan*, 160 Pa. St. 119, it was held that where a vital error was committed by the trial courts, but the appellant failed to file his bill and have the record put in proper shape for review, owing to erroneous ideas of practice, which were corrected by decisions of the supreme court announced after the appeal was taken, the trial court should allow a bill *nunc pro tunc*, or in such other form as in its discretion should seem best. The second point in the syllabus of the principal case is to the same general effect, though it seems *obiter*. The signing of a bill *nunc pro tunc* is unknown *eo nomine* in our practice, if by that is meant a signing after the prescribed time, our rules upon this point contemplating only action *nunc* and never *tunc*. Just what relaxation of the rule our courts might make in any of the cases of extreme hardship that have been suggested, we of course cannot say, but our general advice to the exceptant is, Do it *nunc*.